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San Manuel Indian Bingo and Casino and Hotel Employees and Restaurant Employees International Union, CLC¹ and Communications Workers of America, AFL–CIO, CFC, Party in Interest and State of Connecticut, Intervenor. Cases 31–CA–23673 and 31–CA–23803

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

Upon charges filed by Hotel Employees and Restaurant Employees International Union (the Union), the General Counsel of the National Labor Relations Board issued an order consolidating cases and notice of hearing on September 30, 1999. The consolidated complaint alleges that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (2) of the National Labor Relations Act. The Respondent filed an answer to the consolidated complaint.

On January 18, 2000, the Respondent filed with a Board a motion to dismiss the consolidated complaint for lack of jurisdiction. On May 28, 2004, the Board denied the Respondent's motion to dismiss, and affirmatively asserted jurisdiction over the Respondent. 341 NLRB No. 138 (2004). On March 9, 2005, the Respondent filed an amended answer to the consolidated complaint.

On March 22, 2005, the General Counsel filed a motion to transfer the proceeding to the Board and for summary judgment. On March 25, 2005, the Board issued an Order transferring the proceeding to the Board and notice to show cause why the motion for summary judgment should not be granted. Thereafter, the General Counsel and the Respondent filed briefs in support of their respective positions. On May 5, 2005, the General Counsel filed a motion to strike and reply to Respondent's opposition to the General Counsel's motion for summary judgment. The Respondent filed a response to the motion to strike. With the Board's permission, the State of Connecticut filed an amicus brief in support of the General Counsel's motion for summary judgment. The Respondent filed a response to the amicus brief.

¹ We have amended the caption to reflect the disaffiliation of the Hotel Employees & Restaurant Employees International Union, AFL–CIO, effective September 14, 2005.

I. THE ISSUE

In its amended answer, the Respondent has admitted all factually material allegations of the consolidated complaint, while maintaining its affirmative defense that the Board lacks jurisdiction. Accordingly, the sole issue presented here is whether the Board lacks jurisdiction over the Respondent.

A. The Contentions of the Parties

In its affirmative defenses, the Respondent contends that the Board cannot exercise jurisdiction over the Respondent because it is owned and operated by a federally recognized Indian tribe within the confines of an Indian reservation pursuant to the terms of the Indian Gaming Regulatory Act; it is not an employer within the meaning of the National Labor Relations Act (NLRA); and application of the NLRA to the tribe is preempted by the Indian Gaming Regulatory Act.

The General Counsel asserts that this issue was previously litigated and decided in this case. In this regard, the General Counsel points to the Board's Order denying the Respondent's motion to dismiss the complaint for lack of jurisdiction, in which the Board articulated a new standard for asserting jurisdiction over Indian owned and operated enterprises and under which it asserted jurisdiction over the Respondent.

The General Counsel also maintains that to the extent that the Respondent has offered a new argument to support its position that the Board lacks jurisdiction, that argument is untimely, improper, and should be struck.² In the alternative, the General Counsel argues that the new argument should be rejected as an impermissible attempt to relitigate the jurisdiction issue. Finally, in view of the Respondent's admission of all factually material allegations of the consolidated complaint, the General Counsel requests the Board to find that the Respondent has committed the violations of Section 8(a)(2) and (1) of the Act set out in the consolidated complaint.

B. Discussion

We agree with the General Counsel that it would be improper to relitigate the issue of jurisdiction at this juncture.³ The Board has already decided that issue in

² The Respondent argues that the Board lacks jurisdiction for the reasons stated in its motion to dismiss and because its tribal relations ordinance, which is a component of its compact with the State of California, preempts the NLRA pursuant to the Compact Clause of the Constitution.

³ Member Schaumber notes that he dissented from the Board's denial of the Respondent's motion to dismiss. He would find that the Board does not have jurisdiction here. Member Schaumber agrees with his colleagues, however, that the Respondent may not relitigate the jurisdiction issue now and therefore joins in granting the General Counsel's summary judgment motion.

this case, in the context of the Respondent's motion to dismiss the complaint, and the Respondent has presented no newly discovered and previously unavailable evidence and/or special or changed circumstances that would necessitate reexamination of the Board's decision to assert jurisdiction. The Respondent has not presented any special evidence that would require us to reach a different result. Nor has the Respondent provided any reason why it could not have presented its argument regarding the preemption of the Act by its tribal labor relations ordinance under the Compact Clause of the Constitution to us in support of its motion to dismiss. See *Wayne County Neighborhood Legal Services*, 249 NLRB 1260, 1263 (1980). Accordingly, we find that the Respondent's affirmative defenses are without merit.⁴

Because the Respondent has admitted the factually material allegations in the consolidated complaint, those allegations must be considered to be true.

II. THE UNFAIR LABOR PRACTICE CASE

The Board has considered the briefs and the entire record in this proceeding and makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation, has been engaged in the operation and maintenance of a gaming establishment, including a gaming casino, restaurants, eating facilities, retail shops, and other retail stores, in Highland, California. During the calendar year ending December 31, 1998, the Respondent, in conducting its gaming establishment operations described above, derived gross revenues in excess of \$500,000. During the same period of time, the Respondent, in conducting its operations described above, purchased and received at its Highland, California facilities goods and materials valued in excess of \$50,000, which goods and materials originated from points outside of California. We find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The consolidated complaint alleges, the Respondent does not deny, and we find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICE PROCEEDINGS

The consolidated complaint alleges, the Respondent in effect admits, and we find that the Respondent violated

Section 8(a)(2) and (1) of the Act by rendering aid, assistance, and support to the Communications Workers of America (CWA). Specifically, the consolidated complaint alleges, the Respondent in effect admits, and we find that the Respondent: (a) permitted CWA, through its agents, to place a trailer in a parking lot on Respondent's property and to use said trailer for the purpose of organizing Respondent's employees; (b) permitted CWA, through its agents, to place CWA's banner on said trailer for the purpose of organizing Respondent's employees; (c) permitted CWA, through its agents, to place a bulletin board and CWA leaflets and other writings near the said trailer; (d) permitted CWA, through its agents, to talk to employees of the Respondent inside the Respondent's facility during said employees' work time and nonwork time for the purpose of organizing the Respondent's employees; and (e) denied, through Mazzie and other security guards, agents, and supervisors, the Union access to its facility and employees on an equal or equivalent basis with the access granted to CWA.

CONCLUSION OF LAW

By rendering aid, assistance, and support to CWA and denying the Union access to its facility and employees on an equal or equivalent basis with the access granted to CWA, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, San Manuel Indian Bingo and Casino, Highland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Allowing Communications Workers of America, AFL-CIO, CLC, to place a trailer, a banner, and a bulletin board on its property, and to leaflet and talk to employees at its facility for the purpose of organizing Respondent's employees, and denying Hotel Employees and Restaurant Employees International Union or any other union access to its property, facility, and employees on an equal and equivalent basis at a time when a question concerning initial representation could be raised.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, provide representatives of Hotel Employees and Restaurant Employees International Union or any other union the same rights of access to its property, facility, and employees on an equal and equivalent

⁴ In light of our conclusion, we find it unnecessary to address the General Counsel's motion to strike.

basis at a time when a question concerning initial representation could be raised.

(b) Within 14 days after service by the Region, post at its facility in Highland, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director of Region 31, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁵ If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with your free exercise of these rights.

WE WILL NOT disparately deny representatives of the Hotel & Restaurant Employees International Union (HERE) or any other union access to our property to communicate with or solicit support from you at a time when a question concerning initial representation could be raised.

WE WILL NOT provide unlawful aid, assistance, or support to the Communications Workers of America (CWA) and its representatives.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL provide representatives of HERE or any other union the same rights of access to our property and our employees that we provided to CWA and its representatives, at such time as a question concerning initial representation could be raised.

SAN MANUEL INDIAN BINGO AND CASINO